

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

MCA No. 1321/2006 in S.A.No.175/2004

Smt. Simabai wd/o Gendalalji Mishra vs. Smt. Ramdulari w/o Amrutlal Banode and others.

Notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's
Orders.

CORAM : **A.P. Lavande,J**
DATE OF RESERVING : **7.9.2007**
DATE OF PRONOUNCEMENT: 21.9.2007

Heard Mr. S.V.Purohit, learned counsel for the applicant and Mr. P.A.Deshmukh, learned counsel for the respondents.

2. By this application the applicant seeks review of the order dated 23.9.2004 passed by this Court summarily dismissing the Second Appeal No. 175/2004 filed the applicant against the Judgment and decree dated 27.1.2004 passed in Reg. Civil Appeal No. 231/2000 by Ad hoc Additional District Judge, Wardha dismissing the appeal filed by the present applicant and Smt. Shantabai Choube against the judgment and decree dated 1.9.1998 passed by the Joint Civil Judge, Sr. Dn., Wardha in Special Civil Suit No. 10 of 1993.

3. The above suit was filed by the respondents for

specific performance of agreement entered into between the respondents and the applicant and Smt. Shantabai Choube. The learned trial Court decreed the suit and appeal preferred by the original defendants was dismissed. As stated above the Second Appeal filed by the present applicant was also dismissed summarily.

In support of the application Mr. Purohit has raised two grounds. According to the plaintiffs in terms of the agreement of sale possession was handed over to the plaintiffs and, therefore, the agreement was conveyance and as such in terms of Article 25 of the Bombay Stamps Act and Section 54 of the T.P. Act the said document could not have been admitted in evidence for want of registration and on the ground that it was insufficiently stamped. Secondly, Mr. Purohit contended that since the respondents- plaintiffs did not claim possession of the suit property both the courts could not have granted decree for possession. The trial court could held that the plaintiffs were not put in possession pursuant to the agreement of sale and granted decree of possession of the suit property in favour of the plaintiffs. According to Mr. Purohit, in the absence of any specific prayer for possession the learned trial court could not have granted decree for possession and, therefore, the decree passed by the trial court as well as decree passed by the lower appellate court deserve to be quashed and set aside.

4. In support of his submissions Mr. Purohit placed reliance upon Section 22 of the Specific Reliefs Act, 1963 and also placed reliance on the following judgments.

- i) Veena Hasmukh Jain and another vs. State of Maharashtra and others.
(AIR 1999 Supreme Court, 807)
- ii) Adcon Electronics Pvt. Ltd. vs. Daulat and another
(2001(4) Mh. L.J., 469)

5. Per contra, Mr. Deshmukh the learned counsel for the respondents-plaintiffs submitted that the point regarding admissibility of the agreement of sale was not taken before the trial court nor this point was raised before the lower appellate court and, therefore, the applicant is not entitled to raise this point for the first time in Second Appeal filed before this court. Mr. Deshmukh, in so far as the point raised by Mr. Purohit regarding want of prayer for possession by the plaintiff is concerned, submits that this point was not raised in the memo of appeal filed before this court and as such the applicant is not entitled to raise this point for the first time in review application. In support of his submission Mr. Deshmukh relied upon the following

judgments;

- i) Soosai Anthony D'Costa Nicholas D'Costa
.vs. Francis Roche Anthony Kurush Roche
and others.

AIR 1962 Madras 304.

- ii) Ramavilasom Grandhasala and others vs.
N.S.S.Karayogain

AIR 2000 Supreme Court 2058.

6. Having considered the submissions made by the learned counsel for the parties and having perused the records as well as the judgments relied upon by counsel for the parties I am of considered opinion that the application for review filed by the applicant has no merit. In so far as inadmissibility of agreement of sale is concerned it is pertinent to note that this point has been raised, for the first time, in the memo of appeal filed before this Court. In my opinion, this is not the pure question of law which could have been raised for the first time in Second Appeal. In any case the trial court has not accepted the version of the plaintiffs that they were put in possession of the suit property pursuant to the agreement of sale. Therefore, no case is made out for granting review on this ground.

7. In so far as the second ground raised by the

applicant is concerned, no doubt the Apex Court in Adcon Electronics Pvt. Ltd. (supra) has held that in a suit for specific performance of agreement of sale of the suit property the plaintiff must seek recovery of possession. However, it is pertinent to note that this ground was neither pressed in the first appeal nor raised in the memo of appeal filed before this court. It is well settled that the review is not an appeal in disguise and a party is not entitled to raise new point in review application. In view of this clear legal position I am of the considered opinion that no case is made out for reviewing the order dated 23.9.2004 passed by this court dismissing summarily the Second Appeal No. 175/2004.

8. For the reasons aforesaid the application is dismissed. However, having regard to the facts and circumstances of the case the parties are directed to bear their own costs.

Judge

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